

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Community Affairs Committee

BILL: SB 1556

INTRODUCER: Senator Baker

SUBJECT: Property Rights

DATE: April 8, 2009

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|----------|----------------|-----------|------------------|
| 1. | Wolfgang | Yeatman | CA | Favorable |
| 2. | _____ | _____ | JU | _____ |
| 3. | _____ | _____ | TA | _____ |
| 4. | _____ | _____ | _____ | _____ |
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| 6. | _____ | _____ | _____ | _____ |

I. Summary:

The bill makes a number of revisions to the Bert J. Harris, Jr., Private Property Rights Protection Act (the Bert Harris Act or Act), including:

- Redefining the terms “inordinate burden” and “inordinately burdened” to include a moratorium on development that is in effect for longer than 1 year.
- Reducing the timeframe for a property owner to provide a written claim to a governmental entity from 180 days to 120 days.
- Adding “payment of compensation” to the list of remedies a governmental entity may include in a written settlement offer.
- Providing that a governmental entity’s failure to make a written settlement offer or issue a ripeness decision during a specified period operates as a final decision that identifies uses of the subject property and which has been rejected by the property owner.
- Specifying that enacting a law or adopting a regulation does not constitute applying the law or regulation to a property.

Under this bill, the State waives sovereign immunity for liability for actions subject to the Act, but only to the extent provided in s. 70.001, F.S. This bill is prospective and does not apply to any action filed under the Act which is pending on July 1, 2009.

This bill substantially amends section 70.001 of the Florida Statutes.

II. Present Situation:

Takings

The government may acquire private property through the power of eminent domain, provided

the property owner is compensated.¹ The Fifth Amendment to the United States Constitution guarantees that citizens' private property shall not be taken for public use without just compensation. The "takings" clause of the Fifth Amendment is applicable to the states through the Fourteenth Amendment, which provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

Article I, s. 2 of the State Constitution also guarantees all natural persons the right to "acquire, possess and protect property" and further provides that no person will be deprived of property without due process of law.² Article X, s. 6 of the State Constitution is complimentary to the Fifth and Fourteenth Amendments to the United States Constitution. It provides that "[n]o private property shall be taken except for a public purpose and with full compensation therefor paid to each owner. . . ."

In addition actually physically infringing upon the property, certain regulations on property can constitute a taking. Where a governmental regulation results in permanent physical occupation of the property or deprives the owner of "all economically productive or beneficial uses" of the property, a "per se" taking is deemed to have occurred, thereby requiring full compensation for the property.³ Additionally, where the regulation does not substantially advance a legitimate state interest, it is invalid⁴ and the property owner may recover compensation for the period during which the invalid regulation deprived all use of the property.⁵

In other "takings" cases, courts have used a multi-factor, "ad hoc" analysis to determine whether a regulation has adversely affected the property to such an extent as to require government compensation. The factors considered by the courts include:

- the economic impact of the regulation on the property owner;
- the extent to which the regulation interferes with the property owner's investment-backed expectations;
- whether the regulation confers a public benefit or prevents a public harm (the nature of the regulation);
- whether the regulation is arbitrarily and capriciously applied; and
- the history of the property, history of the development, and history of the zoning and regulation.⁶

The Supreme Court, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, rejected property owners' contentions that a three-year moratorium on development constituted a per se taking of property requiring compensation under the Takings Clause.⁷ The court recognized that there are a wide range of "moratoria" that occur as a regular part of land

¹ Chapters 73 and 74, Fla. Stat. (2002).

² FLA. CONST. Art. I, s. 9.

³ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

⁴ *See Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

⁵ *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

⁶ *See Reahard v. Lee County*, 968 F.2d 1131, 1136 (11th Cir. 1992). *See also Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); *Graham v. Estuary Properties*, 399 So. 2d 1374 (Fla. 1981).

⁷ 535 U.S. 302

use regulation such as “normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like.”⁸ The court ultimately determined that the length of time that a parcel of property was undevelopable was one of the many factors to be considered when determining whether a taking has occurred.

Prior to the enactment of the Bert Harris Act,⁹ Florida landowners had two judicial remedies available when their properties’ value or usefulness was destroyed or severely diminished by government regulation. A property owner could proceed against the governmental entity under the doctrine of equitable estoppel to enjoin the government from revoking a permit or attempting to apply a new regulation.¹⁰ This doctrine applies when a property owner, in good faith reliance on a governmental act or omission with respect to governmental regulations, has made a substantial change in position or incurred substantial expenses.¹¹ Alternatively, if a regulation directly caused a substantial diminution in value, one which reached the level of a taking of the property, the property owner could file an inverse condemnation claim under the Fifth Amendment of the United States Constitution or Article X, section 6 of the Florida Constitution. However, a property owner would not be entitled to any relief if the government action was not a “taking” or the property owner did not satisfy the equitable estoppel requirements.¹²

The Bert Harris Act

In 1995, the Bert Harris Act was enacted by the Legislature to provide a new cause of action for private property owners whose property has been “inordinately burdened” by state and local government action that may not rise to the level of a “taking” under the State or Federal Constitution.¹³ The inordinate burden applies either to an existing use of real property or a vested right to a specific use, as determined by application of the rules of equitable estoppel.¹⁴

An inordinate burden is a government action that has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for:

- the existing use of the real property;
- a vested right to a specific use of the real property with respect to the real property as a whole;
- or that the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large.

The terms “inordinate burden” or “inordinately burdened” do not include:

- temporary impacts to real property;
- impacts to real property occasioned by governmental abatement;

⁸ See *id.* (quoting *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987)).

⁹ Chapter 70, F.S.

¹⁰ See, Vivien J. Monaco, Comment, *The Harris Act: What Relief From Government Regulation Does It Provide For Private Property Owners*, 26 Stetson Law Review 861, 867 (1997).

¹¹ See *id.*, citing *Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So. 2d 10, 15-16 (Fla. 1976).

¹² See *id.*

¹³ Section 70.001(1) and (9), F.S.

¹⁴ Section 70.001(2)-(3)(a), F.S.

- prohibition, prevention, or remediation of a public nuisance at common law or a noxious use of private property; or
- impacts to real property caused by an action of a governmental entity taken to grant relief to a property owner.

Under s. 70.001, F.S., a property owner seeking compensation must present a written claim to the head of the governmental agency whose action caused the inordinate burden, along with a valid appraisal that shows the loss of the fair market value. The property owner must commence their cause of action within one year of the date the “law or regulation is first applied by the governmental entity.” This has been interpreted as starting the running of the time limitation when the legislative or quasi-legislative restriction is adopted.¹⁵

The governmental entity then has 180 days to make a written settlement offer that may include:

- An adjustment of land development or permit standards or other provisions controlling the development or use of the land;
- Increases or modifications in the density, intensity, or use of areas of development;
- The transfer of development rights;
- Land swaps or exchanges;
- Mitigation, including payments in lieu of on-site mitigation;
- Location of the least sensitive portion of the property;
- Conditioning the amount of development permitted;
- A requirement that issues be addressed on a more comprehensive basis than a single proposed use or development;
- Issuance of the development order, a variance, special exception, or other extraordinary relief;
- Purchase of the real property, or an interest therein, by an appropriate governmental agency; or
- No changes to the action of the governmental entity.¹⁶

If the property owner accepts the settlement offer, then the government implements it pursuant to s. 70.001(4)(d), F.S. If the settlement offer is declined, the government must issue within the 180-day period a written ripeness decision, which must contain identification of allowable uses on the affected land. This ripeness decision serves as the last prerequisite to judicial review, thus allowing the landowner to file a claim in circuit court.

Under s. 70.001(6)(a), F.S., the court decides if there was an existing use of the property or a vested right to a specific use, and if so, whether the governmental action inordinately burdened the property. Private property is inordinately burdened when a government action has directly restricted or limited the use of the property so that the owner is unable to attain reasonable, investment-backed expectations for the existing use, or a vested right in the existing use, of the property as a whole. Alternatively, property is inordinately burdened if the owner is left with existing or vested uses which are unreasonable such that the owner would permanently bear a

¹⁵ See *Citrus County v. Halls River Development, Inc.*, 2009 WL 722053 (Fla. 5th DCA 2009).

¹⁶ Section 70.001(4), F.S.

disproportionate share of a burden imposed for the public good which should be borne by the public at large.¹⁷

If the court finds the governmental action has inordinately burdened the subject property, the court will apportion the percentage of the burden if more than one governmental entity is involved. The court then impanels a jury to decide the monetary value, pursuant to s. 70.001(6)(b), F.S., based upon the loss in fair market value attributable to the governmental action. The prevailing party is entitled to reasonable costs and attorney's fees, pursuant to s. 70.001(6)(c), F.S., if the losing party did not make, or reject, a bona fide settlement offer.

Sovereign Immunity

The doctrine of sovereign immunity, as derived from the English common law, provides that the government cannot be sued in tort without its consent.¹⁸ This blanket of immunity applies to all subdivisions of the state including its agencies, counties, municipalities, and school boards; however, Article X, s. 13 of the State Constitution, provides that sovereign immunity may be waived through an enactment of general law.

The Legislature, in s. 768.28, F.S., has expressly waived sovereign immunity in tort actions for claims against its agencies and subdivisions resulting from the negligent or wrongful act or omission of an employee acting within the scope of employment, but established limits on the amount of liability. A claim or judgment by any one person may not exceed \$100,000, and may not exceed \$200,000 paid by the state or its agencies or subdivisions for claims arising out of the same incident or occurrence. Notwithstanding this limited waiver of sovereign immunity, certain discretionary governmental functions remain immune from tort liability.¹⁹

The Bert Harris Act provides a process for claims against a governmental entity for certain actions. Specifically, the provisions of the Act operate as a separate and distinct cause of action from the law of takings to provide “for relief, or payment of compensation, when a new law, rule, regulation, or ordinance of the state or a political entity in the state, as applied, unfairly affects real property.”²⁰

Section 70.001(13), F.S., provides that, “This section does not affect the sovereign immunity of government.” In 2003, the Third District Court of Appeal overturned a trial court's decision that subsection (13) serves to bar a cause of action against a governmental entity.²¹ Specifically, the

¹⁷ Section 70.001(2)(e), F.S.

¹⁸ Wetherington and Pollock, *Tort Suits Against Governmental Entities in Florida*, 44 Fla. L. Rev. 1 (1992); Public policy in support of sovereign immunity includes: (a) protecting public funds from excessive encroachments; (b) insulating the Legislature's authority over budget expenditures from judicial directives to disburse funds; (c) enabling government officials to engage in decision making without risking liability; and (d) ensuring that the efficient administration of government is not jeopardized by the constant threat of suit. Policy against sovereign immunity includes: (a) leaving those who have been injured by governmental negligence without remedy; (b) failing to deter wrongful government conduct; and (c) limiting public knowledge of governmental improprieties. House of Representatives Committee on Claims, *Sovereign Immunity: A Survey of Florida Law*, at 1-2, January 25, 2001.

¹⁹ See *Commercial Carrier Corp., v. Indian River County*, 371 So. 2d 1010, 1019 (Fla. 1979), citing *Evangelical United Brethren Church v. State*, 67 Wash.2d 246, 407 P.2d 440 (1965).

²⁰ Section 70.001(1), F.S. Section 70.001(13), F.S., provides that “section does not affect the sovereign immunity of government”.

²¹ See *Royal World Metropolitan, Inc. v. City of Miami Beach*, 863 So. 2d 320 (Fla. 3rd DCA 2003).

court found s. 70.001, F.S., "evinces a sufficiently clear legislative intent to waive sovereign immunity as to a private property owner whose property rights are inordinately burdened..."²²

III. Effect of Proposed Changes:

Section 1 amends s. 70.001, F.S., to state that a moratorium on development as defined in s. 380.04, F.S. that is in effect for longer than 1 year is not necessarily a temporary impact to real property such that it would be excluded from the definition of inordinate burden. A property owner seeking compensation under the Act must present a claim in writing to the governmental entity not less than 120 days before filing an action against the entity. (Current law provides a 180-day period and authorizes a governmental entity to make a written settlement offer or issue a written ripeness decision during that period.) This section provides that a written settlement offer may include payment of compensation.

Under this bill, a governmental entity's failure to make a written settlement offer or issue a written ripeness decision within the 120-day period shall operate as a final decision, identifying the uses of the subject property, which has been rejected by the property owner.

The bill specifies that enacting a law or adopting a regulation does not constitute *applying* the law or regulation to property so as to trigger the one year statute of limitations. The law specifies that consideration may be given to the length of time that has elapsed since the enactment of a law, rule, regulation, or ordinance when determining whether an inordinate burden has been imposed. In this way the bill seems to change the way that at least one court has interpreted the law. The question will be: what does it mean for a law or regulation to be applied by the governmental entity if it does not mean the time at which the law is enacted?

The bill creates subsection (13) to waive sovereign immunity for liability for actions subject to the Act, but only to the extent provided in s. 70.001, F.S.

Section 2 provides that this bill is prospective and does not apply to any action filed under the Act which is pending on July 1, 2009.

Section 3 of the act provides an effective date of July 1, 2009.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

²² See *id.* at 322.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill expands the options for private property owners to obtain compensation or another remedy for governmental action that inordinately burdens real property by making it clear that certain moratoria lasting more than one year are not necessarily “temporary” so as to be excluded from the definition of inordinate burden.

C. Government Sector Impact:

The bill reduces the timeframe for the governmental entity to respond to the claim, and expressly waives sovereign immunity for claims under the Act.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The statute leaves open for reinterpretation what it means for a law or regulation to be applied by the governmental entity because the bill states that it does not mean the enactment of the law or regulation.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.